Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1574

CENTRAL BANK OF CLAYTON, a Corporation,
Petitioner,

vs.

CLAYTON BANK, a Corporation, FIRST NATIONAL BANK OF CLAYTON, a Corporation, ST. LOUIS COUNTY NATIONAL BANK, a Corporation, JAMES R. JAMES, ALPHONSE J. RUCH and EDWARD H. SCHMIDT,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

	Page
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	4
Statement of the Case	5
A. The Nature of the Case	5
B. The Basic Facts	6
Proceedings in the District Court	8
Proceedings in the Circuit Court	10
Reasons for Granting the Writ	11
I. By proceeding in the manner hereinafter set out, the courts below have so far departed from the usual and accepted judicial proceedings, as mandated by the law and the decisions of this court, that the exercise of this court's supervisory power is called for	11
II. The affirmed opinion below in holding that civil antitrust liability cannot be predicated upon defendants' conduct consisting of the concerted utilization of state administrative and judicial processes on sham and spurious grounds for the sole purpose of carrying out an agreement, conspiracy and scheme to attempt to monopolize by restraining and preventing entry by prospective competitors conflicts with prior decisions of this court and other courts of appeal	16
Conclusion	30

Appendix:

A. Opinion of the Circuit Court of Appeals A-1

B. Opinion of the District Court A-3

C. Order extending time for filing petition for rehearing to February 7th, 1977 .....A-13

D. Order denying petition (suggestions) for rehearing en banc, entered on February 16, 1977 .....A-14

E. Order denying petition for rehearing, dated February 17, 1977 .....A-15

F. The complaint A-16

G. Plaintiff's motion for reconsideration, modification and for leave to file a first amended complaint A-23

H. Order overruling plaintiff's motion for reconsideration, modification and for leave to file an amended complaint A-26

I. Final opinion of St. Louis Court of Appeals in charter application proceedings, in relevant part A-27

Table of Cases

Adam v. Saenger, 303 U. S. 59 (1938) 13

American Tobacco Growers v. Neal, 183 F. 2d 869 (4th, 1950) 18

American Tobacco Co. v. U. S., 328 U. S. 781 (1946) .. 28

Ancon Contracting Co. v. Herman, 208 N.Y.S. 659 25

Austin v. House of Vision, 385 F. 2d 171 (7th Cir. 1967) 14, 15

Bryson v. Guarantee Reserve Life Ins. Co., 520 F. 2d 563 (8th Cir. 1975) 12

California Motor Transport Company v. Trucking Unlimited, 404 U. S. 508 (1972) 14, 15, 19, 20, 21, 22, 23 24, 25, 26, 27, 28, 29

Cantor v. Detroit Edison Co., 49 L. Ed. 1145 (1976) 29

Central Bank of Clayton v. State Banking Board of Missouri, 509 S. W. 2d 175 (Mo. App. 1975) 13

Conley v. Gibson, 355 U. S. 41-45 (1957) 12, 13

Continental Ore Company v. Union Carbide Corp., 370 U. S. 690, 788 (1962) 29

Cornwell Quality Tools Co. v. C.T.S. Co., 446 F. 2d 825 (9th Cir. 1971) 14

Durasteel Co. v. Great Lakes Steel Co., 205 F. 2d 438-441 (8th Cir. 1953) 25

Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U. S. 127 (1961) 14, 19, 20, 21, 25, 26, 27

Fidelity Stand. Life Ins. Co. v. First National B. & T. Co., 510 F. 2d 272 (5th Cir. 1975) 13

Forman v. Davis, 371 U. S. 178 (9 L. Ed. 2d 223) (1962) 15

Fortner Enterprises v. U. S. Steel Corp., 394 U. S. 495 (1969) 14

Goldfarb v. Virginia Bar, 421 U. S. 773 29

Greenville Publishing Co., Inc. v. Daily Reflector Inc., 496 F. 2d 391 (1974) 14

Hazen Research Inc. v. Omega Minerals Inc., 497 F. 2d 151 (5th Cir. 1974) 13

Helix Milling Co. v. Terminal Flour Mill Co., 523 F. 2d 1317 (9th Cir. 1975) 13

Hospital Building Company v. Rex Hospital, 48 L. Ed. 2d 338 (1976) 13

Israel v. Baxter Laboratories, Inc., 466 F. 2d 272 (D. C. 1972) 25

Jenkins v. McKeithen, 395 U. S. 411, 421 (1969) 13

Klor's Inc. v. Broadway-Hale Stores Inc., 359 U. S. 207 (1959) 18

Krummel v. Hintz, 222 S. W. 2d 574 (Mo. App. 1949) .. 13

Metcalf v. American Surety Co., 232 S. W. 2d 526, 529 (Mo. 1950) 12

Metro Cable Co. v. City of Rockford, Inc., 516 F. 2d 220 (7th Cir. 1975) 24

National Motor Club of Missouri Inc. v. Noe, 475 S. W. 2d 16 (Mo. Sup. 1972) 22

Neff v. World Publishing Co., 349 F. 2d 235, 239 (8th Cir. 1965) 25

Otter Tail Power Company v. U. S., 410 U. S. 366 (1973) 14, 26, 27, 28

Parker v. Brown, 317 U. S. at 341 (1943) 29

Poller v. Columbia Broadcasting System, 368 U. S. 464 (1962) 14

Quality Mercury Inc. v. Ford Motor Co., 542 F. 2d 466 (8th Cir. 1976) 14

Radiant Burners v. Peoples Gas Light and Coke Co., 364 U. S. 656 (1961) 17

Radovitch v. National Football League, 352 U. S. 445 (1957) 17

Reed v. Board of Education of Parkway School District, 460 F. 2d 824 (1972) 25

Schwegman Bros. v. Calvert Distillers Corp., 341 U. S. 341, 368 (1951) 29

Semke v. Enid Automobile Dealers Association, 456 F. 2d 1361, 1366 (10th Cir. 1972) 25

Slick Airways, Inc. v. American Airlines, Inc., 107 F. Supp. 199 (1952) 29

State v. Gitelman, 221 Minn. 122, 21 N. W. 2d 198 25

Stone v. Grand Lodge A.O.U.W. of Missouri, 92 S. W. 1143 (Mo. App. 1906) 12

Thompson v. Allstate Insurance Company, 476 F. 2d 746 (1973) 25

U. S. v. Radio Corporation of America, 358 U. S. 353 (1959) 12

United Mine Workers v. Pennington, 381 U. S. 657 (1965) 19, 20, 26, 27

United States v. International Building Co., 345 U. S. 502 (1953) 12

United Steel Workers of America v. Mesker Bros. Industries Inc., 457 F. 2d 91 (8th Cir. 1972) 15

White Motor Co. v. United States, 372 U. S. 253 (1963).. 14

Woods Exploration & Production Co. v. Aluminum Company of America, 438 F. 2d 1286-1298 (5th Cir. 1971) 26

Miscellaneous Cited

15 U.S.C.A. Section 1 ..... 1, 4, 5, 8, 17, 18

15 U.S.C.A. Section 2 ..... 1, 4, 5, 8, 17, 18

15 U.S.C. Section 4 ..... 5, 18

15 U.S.C. Section 15 4

28 U.S.C. Section 1254(1) 2
28 U.S.C. Section 1337 ..... 2, 5
28 U.S.C. Section 1738 ..... 5, 13
Rule 8(f) F.R.C.P. 13
Rule 12(b)(6) F.R.C.P. 6, 8
U.S. Const., Article IV, Section 1 4
U.S. Const., Amendment I 4, 19, 20, 21, 22, 24, 26, 30

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioner, Central Bank of Clayton, a Missouri corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on the 14th day of January, 1977 (unreported) (Appx. p. 1), affirming, as being "well reasoned", the "opinion" (memorandum and order) of the United States District Court for the Eastern District of Missouri (424 F. Supp. 163) which sustained defendants' Rule 12(b)(6) motions to dismiss for failure to state a claim under the Sherman Act (15 U.S.C.A. Sections 1, 2) (Appx. p. 3).

JURISDICTION

The court of first instance had jurisdiction of this cause under and by virtue of Sections 1, 2 and 15 of Title 15 U.S.C. and Section 1337, Title 28 U.S.C. Petitioner invokes the jurisdiction of this court under 28 U.S.C. Sec. 1254(1). The opinion of the panel of the Court of Appeals was dated January 14, 1977. Thereafter, and on January 21, 1977, the time for filing a petition for rehearing was extended to and including February 7th, 1977 (Appx. 13). Petition for rehearing, and suggestions for rehearing en banc were filed on February 7, 1977, and "denied" by orders of the Court entered on February 16 (Appx. 14), and on February 17, 1977 (Appx. 15), and this petition is filed with this court within 90 days of said date.

QUESTIONS PRESENTED

I. Have the lower courts so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision by:

(a) Refusing to accept as true the pleaded and admitted fact that defendants' concerted opposition to petitioner's state bank charter application was based solely upon sham, spurious and irrelevant grounds.

(b) Holding that reversed and voided orders, rendered at intermediate levels of appellate proceedings, constitute proof that the parties prevailing under such orders did not rely solely upon false, sham, spurious and baseless grounds.

(c) Denying a motion for leave to file a **first** amended complaint so as to plead with particularity the elements held by the dismissal order to be essential, when the complaint did not

show beyond doubt that petitioner could prove no set of facts which would entitle it to relief.

II. Does Congress have the power, exerted under the federal antitrust laws, to prohibit existing regulated business and their officers from entering into and carrying out agreements, conspiracies, and schemes to act in concert in attempting to monopolize a part of trade or commerce through the use of the procedural machinery of state administrative and judicial processes upon false, sham and spurious grounds for the sole purpose of suppressing competition. More particularly, the questions here presented are as follows:

(a) Is it a violation of either or both of Sections 1 and 2 of the Sherman Act for the only three existing banks in a city, and their chief executive officers, to enter into an agreement and conspiracy among themselves to act in concert in attempting to monopolize the banking business in that city by restraining and preventing the establishment of competing banks?

(b) Does the First Amendment right of petition guarantee immunity from civil antitrust liability where defendants, acting pursuant to and in furtherance of such an agreement and conspiracy, invoke and utilize the processes of state agencies and courts by presenting and relying solely upon false, sham, spurious and irrelevant grounds?

(c) Is it an abuse of the processes of state agencies and courts to invoke and pursue those processes upon false, sham and spurious grounds with the intent and purpose of suppressing competition?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. **Article IV. Section 1.** Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

2. **Amendment I.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

3. The Sherman Act, Section 1 (15 U.S.C. § 1) provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

4. The Sherman Act, Section 2 (15 U.S.C. § 2) provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

5. The Clayton Act, Section 4 (15 U.S.C. § 15) provides in relevant part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the

United States in the district in which the defendant resides or is found."

6. 28 U.S.C. § 1337 provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

7. Section 1738, Title 28, U.S.C. **("State and Territorial statutes and judicial proceedings; full faith and credit),** provides, in pertinent part: Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

STATEMENT OF THE CASE

A. **The Nature of the Case:**

This is a civil antitrust action for treble damages, brought under Section 4 of the Clayton Act (15 U.S.C. 4). Petitioner instituted the action against three banking corporations, Clayton Bank, First National Bank of Clayton and St. Louis County National Bank, and their chief executive officers, James R. James, Alphonse J. Ruch and Edward H. Schmidt. Petitioner claims that it was injured and damaged in its business by reason of defendants' violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sec. 1 and 2), allegedly consisting of entering into and attempting to carry out, by sham, spurious, unmeritorious and unsuccessful appellate litigation, their prior agreement and conspiracy to engage in concerted actions in attempting to monopolize the banking business in the City of Clayton, Missouri. The complaint alleged that as a direct result of defend-

ants' agreement, conspiracy and the conduct pursuant thereto, petitioner was restrained and prevented from engaging in lawful competition in that city during the period from February 28, 1972, to August 12, 1974 (Appx. 22).

Petitioner contends that defendants' agreement, conspiracy, and scheme and their conduct in utilizing the processes of the state administrative agencies and courts for the purpose of carrying them out constitutes an actionable violation of the Sherman Act. Defendants, and the courts below, take the position that no actionable violation of the Sherman Act is pleaded because antitrust immunity exists under the First Amendment to the United States Constitution, irrespective of the fact that defendants' unsuccessful litigation was based upon false, sham, and spurious grounds and was instituted and pursued solely for anticompetitive purposes.

B. **The Basic Facts:**

The basic facts which are alleged in the complaint and admitted by the defendants on their Rule 12(b)(6) F.R.C.P. motions to dismiss are as follows: (Appx. F).

On October 1, 1971, petitioner filed an application for a bank charter with the Commissioner of Finance of the State of Missouri. That application sought a charter for a bank to be located in the City of Clayton, Missouri. The corporate defendants, the only three then existing banks in that City, unsuccessfully opposed that application before that administrative agency.

"Sometime" prior to October 1, 1971, the defendants had "agreed and conspired among themselves to engage in concerted actions in attempting to monopolize the banking business" in the area of the city of Clayton, "by restraining and preventing the establishment" of competing banks (Appx. 18). Pursuant to that agreement and conspiracy, and "solely for the purpose of

accomplishing the purposes" thereof, and "as a part of their scheme to restrain and prevent lawful competition", the defendants engaged in the following concerted activities in utilizing state adjudicative processes by relying solely upon false, sham and spurious grounds, none of which would legally justify denial of a bank charter: (Appx. 18, 19, 20, 21, 22).

(a) Engaged in the practice of opposing any and all applications for establishment of relocation of competing banks.

(b) Opposed petitioner's charter application before the Missouri Commissioner of Finance.

(c) Appealed to the State Banking Board, from the Finance Commissioner's order granting petitioner's charter, on the sham and spurious (false) ground that they were adversely affected by such order.

(d) Induced the Banking Board to enter a subsequently reversed order which purportedly revoked the charter granted by the Commissioner.

(e) Intervened in the judicial review proceedings instituted by petitioner against the State Banking Board in the Circuit Court, despite the fact that they were not and could not have been adversely affected by denial of petitioner's charter.

(f) Induced the Circuit Court to erroneously affirm, in part, the Banking Board's order.

(g) Pursued and exhausted every available appellate procedure in their unsuccessful efforts to sustain the ultimately reversed orders of the Circuit Court and the Banking Board.

PROCEEDINGS IN THE DISTRICT COURT

The complaint was filed on August 12, 1975, in the District Court for the Eastern District of Misosuri. After answering on the merits, thereby foreclosing petitioner's right to file an amended complaint without leave of court (F.R.C.P. 15(a)), all defendants filed Rule 12(b)(6) motions to dismiss. Said motions were based upon the ground that Sections 1 and 2 of the Sherman Act do not prohibit the acts alleged in the complaint and that their alleged conduct does not constitute an actionable violation of the Sherman and Clayton Acts (Appx. 7).

By "memorandum and order" dated April 13, 1976, the District Court sustained said motions and dismissed petitioner's complaint for failure to state a claim. That "memorandum and order" states that the complaint fails to state facts sufficient to bring defendants' conduct within a cause of action, and that there is an insuperable bar to recovery (Appx. 7), in that:

1. "Plaintiff misconstrues the nature of the cause of action authorized by the 'sham exception' to the Noerr-Pennington doctrine" (Appx. 7).

2. The complaint alleges nothing more than attempts to "lawfully" induce state administrative and judicial action favorable to defendants and detrimental to plaintiff (Appx. 7, 8).

3. The complaint did not allege that defendants' conduct was mere sham to cover what was no more than an attempt to interfere directly with plaintiff's business relationships (Appx. 9).

4. The complaint did not allege that defendants' efforts were *not genuine* efforts to influence public officials (Appx. 9).

5. The complaint did not allege a "pattern of baseless claims", but showed that there was only "*one*" lawsuit, and "plaintiff

was not effectively barred from access to the agencies and courts" under the sham test set out in *California Motor Transport* (Appx. 12).

6. The defendants' intervention and appeals were authorized by the state legislature (a defense pleaded in the answers) (Appx. 10).

7. "Whether or not" the grounds urged and relied upon by defendants in such interventions and appeals were "sham and spurious . . . has no bearing upon whether or not a federal antitrust claim exists under the 'sham exception' ", as stated in *California Motor Transport* (Appx. 10).

8. The complaint does not allege "that defendants' interventions and subsequent appeals in the state agencies and courts were baseless" (sham and spurious) (Appx. 12).

9. The complaint fails to allege any facts that "suggest" unethical conduct which could "result in violations in the setting of the adjudicatory process" (Appx. 12).

Timely motion for reconsideration and vacation of the court's order of dismissal, and, alternatively, amendment of said order so as to grant petitioner leave to file a first amended complaint specifically pleading the elements held by the court to be essential, or to convert said motions to dismiss into motions for summary judgment (Appx. G), was filed by petitioner and summarily overruled by the District Court on May 10, 1976, without hearing and without stating any reasons or grounds for such action (Appx. H).

PROCEEDINGS IN THE CIRCUIT COURT

Petitioner duly appealed from the District Court's order of dismissal and from the order denying leave to amend. A panel of the Eighth Circuit Court of Appeals, by an order dated January 14, 1977, the second day following argument and submission (January 12, 1977), affirmed the "opinion" of the District Court as being "well reasoned." Timely petition for rehearing was filed and overruled by the Circuit Court on February 17, 1977. Petitioner also filed a separate petition (suggestion) for "rehearing en banc" pursuant to Rule 7 of Eighth Circuit Rules which for some reason the court considered "as a petition for rehearing" and it was denied by the Court on February 16, 1977, the day before the court denied the "petition for rehearing."

REASONS FOR GRANTING THE WRIT

I. By proceeding in the manner hereinafter set out, the courts below have so far departed from the usual and accepted judicial proceedings, as mandated by the law and the decisions of this court, that the exercise of this court's supervisory power is called for.

(A) It is a cardinal principle of civil procedure that in testing the sufficiency of a complaint on motion to dismiss for failure to state a claim, the court must treat all pleaded facts as true and draw all inferences reasonably permissible therefrom in favor of the pleader. The opinion below shows conclusively that the lower courts, though recognizing its application, have failed to observe and act in accordance with that basic rule.

The opinion below recites that the complaint alleges that the "defendants' interventions and appeals in the agencies and courts" were based upon "several sham and spurious grounds" (Appx. 5), yet, it concludes that "construing the pleadings liberally, it does not appear that defendants' intervention and subsequent appeals were baseless" (Appx. 12). It also discloses that the court reached that somewhat astounding conclusion on the basis of the fact that "defendants prevailed at two stages of the appeals that followed denial of the charter" (Appx. 12). In substance, the lower courts concluded that the mere fact that defendants prevailed under the subsequently reversed and voided orders of the inferior tribunals (Banking Board and Circuit Court) compelled or justified the conclusion that the grounds relied upon by defendants were not and could not have been sham, spurious, baseless and irrelevant. That conclusion is patently untenable for a number of reasons.

First, even if such reversed orders were not nullities, they were not final judgments in the proceedings and neither of them

ruled or even touched upon the question as to whether or not the grounds urged by defendants were false, sham, spurious or baseless. Therefore, they could neither be conclusive of nor persuasive on that question. Judgments are not conclusive of or persuasive on questions which they have not determined, *United States v. International Building Co.*, 345 U.S. 502 at 505 (1953), and *Bryson v. Guarantee Reserve Life Ins. Co.*, 520 F.(2) 563 at 566 (8th Cir. 1975), and administrative orders determining convenience and need can neither constitute a binding adjudication on antitrust issues nor exempt parties acting thereunder, *U. S. v. Radio Corporation of America*, 358 U. S. 353 at concurring opinion 358 (1959).

Second, the two stages of the appeals at which the defendants prevailed did not follow "denial of the charter." On the contrary, they followed a *grant* of the charter by the administrative agency of original jurisdiction, the Commissioner of Finance, and the order of that agency was affirmed and "reinstated" by the final appellate court judgment which reversed the two orders under which defendants prevailed (Appx. 4, 5).

Third, the complaint alleged, and by their motions the defendants admitted, that their interventions and appeals were based solely upon (baseless) false, sham, spurious, and irrelevant grounds and under the law the lower courts were conclusively bound by that fact. See *Conley v. Gibson*, 335 U. S. 41-45 (1957).

Fourth, under Missouri law, reversed judgments are void and have no force and effect whatever. See *Stone v. Grand Lodge A.O.U.W. of Missouri*, 92 S. W. 1143 (Mo. App. 1906), where the court said "a judgment when reversed by the supreme court becomes a nullity and therefore confers no rights and has no validity for any purpose"; *Metcalf v. American Surety Co.*, 232 S. W. 2d 526, 529 (Mo. 1950), holding that a void judgment is a "nullity . . . without any force and effect

whatever"; and *Krummel v. Hintz* (Mo. App. 1949), 222 S. W. 2d 574, at 578, holding "a judgment which is vacated is destroyed in its entirety upon entry of the order that the judgment be vacated." Moreover, the lower courts could give no greater or lesser force and effect to such reversed judgments than they would have under the laws of the state in which they were rendered. See *Adam v. Saenger*, 303 U. S. 59 at 64 (1938), and *Fidelity Stand. Life Ins. Co. v. First National B. & T. Co.*, 510 F. 2d 272 at 273 (5th Cir. 1975).

The opinion below also states that the "grounds urged" by defendants for refusal of petitioner's bank charter "were properly considered by the agencies and courts for their probative value, *Central Bank of Clayton v. State Banking Board of Missouri*, 509 S. W. 2d 175 (Mo. App. 1975)" (Appx. p. 10). The above referenced decision was the final judgment in the charter proceedings and as such it is conclusively binding upon the lower courts under the Full Faith and Credit Clause of the United States Constitution and Section 1738, Title 28, U.S.C. See *Hazen Research Inc. v. Omega Minerals Inc.* (5th Cir. 1974), 497 F. 2d 151 at 153. That final judgment held that the grounds urged and relied upon by defendants had no relevancy to or probative value on the issues to be determined in granting or refusing a bank charter, and that the reversed order of the Banking Board "inhibits lawful competition in the Clayton banking market" (Appx. pp. 30, 31, 32).

By, in effect, deciding the case on the merits by relying upon voided judgments as constituting evidence that the pleaded and admitted facts are false and untrue, the courts below have drastically departed from accepted and usual course of judicial proceedings contrary to Rule 8(f) F.R.C.P. and have ruled in a manner which is in conflict with this court's decisions in *Jenkins v. McKeithen*, 395 U. S. 411, 421 (1969); *Conley v. Gibson*, supra, and *Hospital Building Company v. Rex Hospital*, decided by the court on May 24, 1976, and reported at

48 L. Ed. 2d 338, l.c. 345. Moreover, summary dismissal of a civil antitrust action in which motive and intent are major factors is improper. Under this court's decision in *California Motor Transport* and *Otter Tail*, both of which are cited and discussed in subsequent parts of this petition, the motive and intent of defendants in invoking and pursuing the state adjudicative processes is a determinative factor. This court, and the circuit courts, have consistently held that summary disposition is not permitted where that situation exists. See *Poller v. Columbia Broadcasting System*, 368 U. S. 464 at 473 (1962); *White Motor Co. v. United States*, 372 U. S. 253, at 259 (1963); *Fortner Enterprises v. U. S. Steel Corp.* (1969), 394 U. S. 495 at 500; *Cornwell Quality Tools Co. v. C.T.S. Co.* (9th Cir. 1971), 446 F. 2d 825 at 832; and *Greenville Publishing Co. Inc. v. Daily Reflector Inc.* (1974), 496 F. 2d 391 at 398. The same rule applies where motions to dismiss, rather than summary judgments, are involved. See *Austin v. House of Vision Inc.*, infra, at 172, where it was said that "the dismissal of a complaint for failure to state a claim is an even more stringent and summary disposition than is summary judgment." In fact, the rule announced in the above decisions of this court was expressly approved by the Eighth Circuit Court less than 5 months before its refusal to follow the rule in the present case (Sept. 27, 1976 to January 14, 1977). See *Quality Mercury Inc. v. Ford Motor Co.* (8th Cir. 1976), 542 F(2) 466 at 472.

(B) The courts below denied petitioner's motion for leave to file a *first* amended complaint (Appx. H). That motion sought leave to amend to allege with more particularity the elements held by the court to be essential to the statement of a claim under the antitrust laws (Appx. G). The opinion below ruled that: the allegation that defendants relied solely upon "sham and spurious" grounds was merely "an oblique suggestion, perhaps, without specifically so stating" that defendants' conduct was not a "genuine" effort to influence public officials so as to fall within the " 'sham exception' to *Noerr* as typified in *California Motor Transport*" (Appx. 9); that the allegation that defendants appealed to the Banking Board on the sham and spurious ground that they were adversely affected (Appx. 19) did not allege "misrepresentations" which could amount to unethical conduct and result in antitrust violations under *California Motor Transport* (Appx. 10), and that the allegation that defendants had engaged in the practice of opposing any and all applications for establishment of competing banks (Appx. 12), did not allege "a pattern of baseless repetitive claims" (Appx. 11).

By so holding, the opinion, by necessary implication, ruled that a claim would have been stated if the complaint had more specifically alleged that defendants' efforts were not "genuine", why defendants were not adversely affected by the grant of the charter, and just what defendants did in engaging in the practice of opposing any and all applications for competing banks. Therefore, petitioner should have been permitted to amend to more specifically plead such facts. By such an outright refusal to permit an amendment, the lower courts have failed to conform to the accepted and usual judicial procedures as to justify the exercise of this court's power of supervision. They have also thereby ruled in a manner which is in conflict with this court's decision in *Forman v. Davis*, 371 U. S. 178 at 182 (1962) (9 L.Ed.(2) 223), in which this Court stated that the "mandate of freely allowing amendments is to be heeded, and outright refusal to grant leave to amend is not the exercise of discretion; it merely is an abuse of that discretion and inconsistent with the spirit of the Federal Rules." It also conflicts with *United Steel Workers of America v. Mesker Bros. Industries Inc.* (8th Cir. 1972), 457 F. 2d 91, l.c. 93. See also, *Austin v. House of Vision* (7th Cir. 1967), 385 F. 2d 171, at 172, where the court said: "where . . . plaintiff seeks an opportunity to amend his complaint in order to meet the objections stated by the trial court, we think he should be accorded such an opportunity."

The District Court's sanctioned departures from accepted and usual judicial procedures were unwarranted, and effectively deprived petitioner of a right to trial on the merits. In concluding on this ground, we submit that it is almost inconceivable how or why, in any one given case, one party could be denied the benefit of so many of the accepted and usual judicial procedures. However, the record shows that it did happen, and if ever a case called for the exercise of this court's supervisory powers, this one does.

II. **The affirmed opinion below in holding that civil antitrust liability cannot be predicated upon defendants' conduct consisting of the concerted utilization of state administrative and judicial processes on sham and spurious grounds for the sole purpose of carrying out an agreement, conspiracy and scheme to attempt to monopolize by restraining and preventing entry by prospective competitors conflicts with prior decisions of this court and other courts of appeal.**

This case squarely presents the question as to whether or not the sanctions of the federal antitrust laws can be applied where restraints of trade result from concerted and unsuccessful attempts by conspirators to prevent entry by qualified prospective competitors through the sham and spurious use of state adjudicative processes in opposing the charter and license applications of such prospective competitors. The affirmed opinion below holds that such conduct does not constitute an actionable violation of the Sherman Act, even though such attempts were made pursuant to defendants' prior agreement, conspiracy, and scheme to attempt to restrain and prevent competition. If that be the rule, then existing businesses in regulated industries, in which governmental approval of entry is required, are authorized to agree and conspire to and to misuse and abuse the administrative and judicial processes solely for the purpose of suppressing and preventing competition, while at the same time

enjoying immunity from civil antitrust liability to the persons injured in their business by such conduct. Such a rule would tend to effectively destroy the treble damage action as a tool for the enforcement of the federal antitrust laws, insofar as such regulated industries are concerned. The case therefore clearly involves an important question of federal antitrust law which has been decided by the lower courts in a manner which appears to conflict with decisions of this court and other circuit courts.

Defendants admit entering into the alleged agreement, conspiracy and scheme to attempt to monopolize the banking business in Clayton, Missouri, by restraining and preventing the establishment of competing banks. By Section 1 of the Sherman Act, every agreement or conspiracy in restraint of trade is declared to be "illegal", and Section 2 of said Act makes it "illegal" to agree and conspire with others to attempt to monopolize any part of trade or commerce. The opinion below, although reciting that the complaint alleged such an "agreement and conspiracy . . . and scheme to restrain commerce and prevent competition" (Appx. 5) made no finding as to whether such an agreement, conspiracy and scheme was illegal under the antitrust laws. Therefore, the question of the legality of defendants' actions in entering into such an agreement, conspiracy and scheme was not resolved by the opinion below. On the contrary, that question was apparently ignored.

In *Radiant Burners v. Peoples Gas Light and Coke Co.*, 364 U. S. 656 at 660 (1961) this Court held that all that is required to state a claim under the antitrust laws are "allegations adequate to show a violation" of such laws, and "in a treble damage action, that plaintiff was damaged thereby." In *Radovitch v. National Football League*, 352 U. S. 445 at 453 (1957), this Court held that the test for the sufficiency of an antitrust complaint is whether "the claim is wholly frivolous"; that a complaint need only be tested under the Sherman Act's

general prohibitions on restraints of trade and meet the requirement that plaintiff was injured thereby, since "Congress has by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party".

It is elementary that agreements and conspiracies to eliminate or exclude competitors constitute *per se* violations of the antitrust laws. See *Klor's Inc. v. Broadway-Hale Stores Inc.*, 359 U. S. 207 (1959); *Helix Milling Co. v. Terminal Flour Mill Co.*, 523 F. 2d 1317 (9th Cir. 1975); and *American Tobacco Growers v. Neal*, 183 F. 2d 869, l.c. 872 (4th, 1950), quoting this court as follows: "If a combination effectively excludes, or tries to exclude outsiders from business altogether, it is a monopoly or an incipient monopoly and it is unconditionally unlawful. That is indeed the standard type of an illicit combination."

If the alleged agreement, conspiracy and scheme of the defendants are illegal under, and forbidden by, Sections 1 and 2 of the Sherman Act, there arises the further question as to whether the complaint sufficiently pleads that petitioner was injured in its business by "anything forbidden by the antitrust laws", so as to be entitled to bring an action for treble damages under Section 4 of the Clayton Act. Therefore, the crucial question is, do the provisions of the Sherman Act forbid the use of the procedural machinery of agencies and courts upon false, sham, spurious and irrelevant grounds for the sole purpose of accomplishing the purposes of an existing agreement and conspiracy to attempt to monopolize a part of trade and commerce? If this crucial question be answered in the negative, no cause of action exists, and if it be answered in the affirmative, a cause of action does exist.

By holding that no claim for relief is stated by the complaint, the opinion below answers that crucial question in the negative, and in doing so it holds that under this court's prior

decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U. S. 127 (1961) 365 U.S. 127; *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *California Motor Transport Company v. Trucking Unlimited*, 404 U. S. 508 (1972), the proscriptions of the Sherman Act do not apply to such concerted actions. The decisions of this Court in both the *Noerr* and the *Pennington* cases (which announce the so-called *Noerr-Pennington* doctrine) deal exclusively with antitrust liability based on "political activity", consisting of joint, concerted, and *genuine* attempts to influence the adoption of legislation and law enforcement policies, which, if enacted or adopted, would adversely affect competitors. Neither of those decisions involves a question of antitrust liability based upon conduct consisting of the misuse or abuse of the adjudicative processes.

In *Noerr* this Court held that because of the First Amendment right of petition, the Sherman Act cannot be construed as prohibiting "two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly" (365 U. S. 136). The Court reasoned that Congress did not intend and was without power to impose antitrust liability upon parties guilty of nothing more than the proper exercise of their First Amendment right of petitioning the instrumentalities of government. It further held that combinations "ordinarily characterized by an express or implied agreement or understanding that participants will jointly . . . help one another to take away the trade freedoms of others" are violative of the Sherman Act (365 U. S. 136).

Clearly, the *Noerr* decision is limited to a holding that joint and concerted "political activity" consisting of *genuine* attempts to influence legislative and law enforcement policies, constitutes a proper exercise of the First Amendment right of petition, and

is not prohibited by the antitrust laws, even if made for anticompetitive purposes. Moreover, *Noerr* makes it clear that First Amendment immunity does not exist and that the sanctions of the antitrust laws can be applied if such conduct, through ostensibly involving the exercise of First Amendment rights, is, in fact, nothing more than an attempt to interfere directly with the business relationships of a competitor (365 U. S. 144). The test for determining antitrust immunity, as announced by *Noerr*, has no application where an antitrust claim is not based upon "political activity", and adjudicatory processes rather than political or legislative processes are involved.

The *Pennington* case also involved a question of the application of the antitrust laws to conduct consisting of political activity (successful efforts to induce the Secretary of Labor to adopt an administrative rule under the Walsh-Healy Act fixing minimum wage scales for coal producers selling coal to T.V.A.). This Court's decision in that case held that the joint efforts of the antitrust defendants in urging the Secretary to adopt such regulation, even though their purpose in doing so was to bring about the destruction of small coal producers, amounted to "political activity" and was not prohibited by the antitrust laws (381 U. S. 569, 670). Therefore, *Pennington*, like *Noerr*, has no application to the facts involved in the present controversy.

In *California Motor Transport* (1972) (404 U. S. 508), this Court considered the question of the applicability of the antitrust laws to joint and concerted activity consisting of attempts to influence public adjudicative bodies (agencies and courts), for the purpose of restraining or preventing competition. Defendants in that case contended that antitrust sanctions could not apply to such attempts because "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." This Court answered that contention by stating that:

1. The complaint did not allege that defendants "sought to influence public officials" but alleged that defendants "instituted the proceedings and actions without probable cause and regardless of the merits of the cases". This court held such an allegation to be equivalent to alleging that defendants "sought to bar their competitors from *meaningful access* to adjudicatory tribunals and to usurp that decision-making process" (404 U. S. 512) (emphasis ours).

2. That there are many forms of illegal and reprehensible practice, including "*misrepresentation*" which may "*corrupt*" the administrative and judicial processes which are not immunized against antitrust liability by the First Amendment right of petition (404 U. S. 513). (emphasis ours)

3. That the exercise of one's First Amendment right of access to the agencies and courts does not necessarily give immunity from the sanctions of the antitrust laws (404 U. S. 513).

4. That First Amendment rights are not immunized against antitrust liability when "used as an integral part of conduct which violates a valid statute" (404 U. S. 514).

5. That the "quoted" allegations of the complaint, that defendants "instituted the proceedings and actions—with or without probable cause, and regardless of the merits of the cases" (404 U. S. 512); and, that the "aim and purpose of the conspiracy was "putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business in California and elsewhere" (404 U. S. 511), "come within the 'sham' exception in the *Noerr* case as adapted to the adjudicatory processes" (404 U. S. 516).

6. That when the facts are such that the "factfinder" can conclude that the "administrative and judicial processes have been abused" immunity under the umbrella of "political expres-

sion" or First Amendment rights of petition cannot be acquired (404 U. S. 513).

7. That "if the end result is unlawful (suppression of competition), it matters not that the means used in violation may be lawful" (parenthetical matter ours) (404 U. S. 515).

Petitioner's complaint alleges, and defendants admit, that defendants initiated the appellate proceedings involving petitioner's charter application by invoking the adjudicative processes by appealing to the Banking Board from the Commissioner's grant of the charter on the false (sham and spurious) ground that they were adversely affected. It therefore conclusively appears that all of the following appellate proceedings, which lasted almost three years, were brought about by and resulted from "misrepresentations" made by the defendants to an adjudicative tribunal. Since *California Motor Transport* expressly holds that "misrepresentations" will "corrupt" the adjudicative processes, and "are not immunized when used in the adjudicatory processes" (404 U. S. 513), the opinion below, by holding that no claim was stated, is in direct conflict therewith.

California Motor Transport also makes it clear that an "*abuse*" of the administrative and judicial processes such as *unmeritorious* or *baseless* litigation, which results in monopoly or the suppression or prevention of competition constitutes an actionable violation of the antitrust laws. Under Missouri law, abuse or misuse of the administrative and judicial processes consists of the use of such process with the intent and for the ulterior purpose of accomplishing some end other than that which such process was designed to accomplish. See *National Motor Club of Missouri, Inc. v. Noe* (1972), 475 S.W. 2d 16, l.c. 24 (Mo. Sup.). Petitioner's complaint alleges and defendants admit that they utilized the administrative and judicial processes *solely* for the purpose of accomplishing the objectives of their illegal agreement and to further their scheme to restrain and prevent lawful competition. The processes of

Missouri's agencies and courts were not designed for use by parties for the purpose of suppressing competition. The complaint therefore alleged facts sufficient to justify the admission of evidence to show an abuse and misuse of the adjudicative processes which produced the unlawful result of suppressing and preventing competition. By holding the complaint to be insufficient, the opinion below conflicts with the *California Motor Transport* decision.

The opinion below appears to further conflict with the *California Motor Transport* in that it construes that decision as holding that there can be no recovery on an antitrust claim based upon use of adjudicative processes unless the facts show that plaintiff has been "effectively barred from access" to such processes. (Appx. 11). In order to be "effectively barred from access" to the processes of agencies and courts, a party would of necessity have to be, in some way, actually prevented from invoking and pursuing those processes. Obviously, unless and until such processes are actually invoked and pursued, there can be no abuse or misuse thereof. Therefore, any such requirement would effectively eliminate any possibility of recovery in antitrust actions based upon the use of litigation to suppress competition. This Court's *California Motor Transport* decision is not reasonably subject to being so construed. If it is, then this case involves an important question of federal antitrust law which has not been, but should be, settled by this court (Rule 19, Rules of Supreme Court). On the contrary, that decision can only be reasonably construed as holding that pleaded facts showing the institution and pursuance of proceedings and actions "without probable cause and regardless of the merits of the cases", are sufficient to show that the parties so instituting such proceedings and actions "sought to bar their competitors from *meaningful access* to adjudicatory tribunals" (emphasis ours) (404 U. S. 512). We think it clear that the fundamental substance of this Court's holding in *California Motor Transport* is that "*meaningful access*" to

adjudicatory tribunals is thwarted or denied where parties are compelled to meet and defend against baseless, unmeritorious, false, sham or spurious claims and contentions (404 U. S. 512-513).

Parties who are legally required to invoke such processes for the purpose of obtaining licenses, permits, or charters, authorizing them to enter and engage in a trade or business of their choice, for which they are otherwise qualified, are by so doing, exercising their First Amendment rights of petition. They are as much entitled to *"meaningful access"* to the processes of such tribunals as are those who for anticompetitive purposes elect to oppose the grant of such licenses, permits or charters. All parties to such proceedings, whether proponents or opponents, are entitled to lawfully and properly invoke and pursue such processes for legitimate purposes, but no party is or should be entitled to misuse or abuse such processes for an ulterior and illegal purpose by urging and relying upon baseless, false, sham and spurious or unmeritorious grounds, under the guise of exercising First Amendment rights. Such conduct not only thwarts or prevents an opponent's free exercise of First Amendment rights by denying *"meaningful access"* to the adjudicatory tribunals, but it also tends to interfere with and prevent the efficient administration of justice. That clearly appears to be the basis upon which this court determined that recovery was permissible in the *California Motor Transport* case, as is indicated by the following Circuit Court Cases.

In construing *California Motor Transport*, the decision in *Metro Cable Co. v. City of Rockford, Inc.* (7th Cir. 1975), 516 F. 2d 220, at 228, a case involving a legislative body, states that "when, however, the concerted activities occur in an adjudicatory setting, unethical conduct . . . may demonstrate that the defendants' activities are not genuine attempts to use the adjudicative process legitimately and may therefore result in illegality, including illegality under the antitrust laws. (This is the

sham exception in the *Noerr* case, as adapted to the adjudicatory process.)"

Under such a construction, the present complaint would appear to be sufficient. False, sham and spurious grounds and contentions cannot be "genuine", *State v. Gitelman*, 221 Minn. 122, 21 N. W. 2d 198; nor can irrelevant grounds or contentions be "genuine", because they are not "probative as to controlling issues", *Durasteel Co. v. Great Lakes Steel Co.*, 205 F. 2d 438-441 (8th Cir. 1953), and *Neff v. World Publishing Co.*, 349 F. 2d 235, 239 (8th Cir. 1965). Moreover, "sham" means "fake", *Ancon Contracting Co. v. Herman*, 208 N. Y. S. 659, and grounds and contentions which are "fake" cannot be "genuine." Webster defines "genuine" as being free from hypocrisy or pretense and states that "false" and "spurious" are antonyms. Perhaps petitioner's claim could have been more artfully drafted, but that fact does not make it fatally defective. In *Reed v. Board of Education of Parkway School District* (1972), 460 F. 2d 824, at 826, the Eighth Circuit Court stated that "the point of principal importance is that lawsuits no longer are to be disposed of solely upon the basis of the phraseology a plaintiff selects in framing his complaint." In *Thompson v. Allstate Insurance Company* (1973), 476 F. 2d 746 at 749, the Fifth Circuit Court stated that "a complaint is not an anagramatic exercise in which the pleader must find just exactly the prescribed combination of words and phrases."

Israel v. Baxter Laboratories, Inc. (D. C. 1972), 466 F. 2d 272, l.c. 278, holds that an "abuse" of administrative processes does "not justify antitrust immunity" and that "no actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption."

Semke v. Enid Automobile Dealers Association (10th Cir. 1972), 456 F. 2d 1361, 1366, in construing the *California Motor Transport* decision stated that "the term 'sham' in the

context would appear to mean *misuse* or *corruption* of the legal processes" (emphasis ours).

Woods Exploration & Production Co. v. Aluminum Company of America (5th Cir. 1971), 438 F. 2d 1286-1298, holds that a *misrepresentation* consisting of the filing of "false nominations" (Gas Production Forecasts) with a state administrative agency, constituted an abuse of the administrative process and foreclosed the defendant's right to rely upon the *Noerr-Pennington* doctrine of First Amendment antitrust immunity.

In *Otter Tail Power Company v. U. S.*, 410 U. S. 366 (1973), this court reviewed a decision of the District Court of Minnesota. The District Court had enjoined Otter Tail from instituting, supporting, or engaging in litigation against municipalities which had voted to establish competing electric power systems. Four separate suits by Otter Tail against four separate cities were involved and with respect to two of those cities, Coleman and Aurora, "litigation" was the only weapon used by Otter Tail to delay, interfere with, or prevent them from establishing competing systems. Moreover, there was no claim that the grounds urged and relied upon by Otter Tail in such litigation were false, sham, spurious, or baseless. The only claim was that Otter Tail was "unsuccessful" in the litigation, in which it apparently relied upon proper, relevant, and genuine grounds. (Footnote 9—410 U.S. 380.) *Otter Tail* contended that under the *Noerr* case such litigation activity did not constitute an actionable violation of the antitrust laws. The District Court denied that contention and held that *Noerr* applied only to efforts to influence the legislative and executive branches of government. This Court remanded the case for reconsideration in the light of the intervening *California Motor Transport* decision, and in doing so stated that the sham exception to *Noerr* could also apply to the use of administrative and judicial processes where "the purpose is to suppress competition, evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims" (410 U. S. 380). This

Court did not hold that evidence of repetitive insubstantial claims is the *only* evidence by which a purpose to suppress competition can be proved.

Upon reconsideration of the case, the District Court found "that the repetitive use of litigation by Otter Tail was "timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly" (360 F. Supp. 451). On the second appeal, that finding by the District Court was "affirmed" by this Court (417 U. S. 901). It would therefore appear that this Court has clearly held that "unsuccessful" litigation, even though it is based upon genuine and proper grounds, falls within the sham exception to the *Noerr-Pennington* doctrine and furnishes a basis for the imposition of the sanctions of the antitrust laws if it appears that such litigation is "timed" and "intended" to prevent or delay the establishment of competition. The opinion below, by holding to the contrary is therefore in direct conflict with and contrary to this Court's *Otter Tail* decision.

Even if we assume for argument purposes that *California Motor Transport* requires the plaintiff to plead resort to repetitive initiation of proceedings and litigation, the complaint in the present case is sufficient. It alleges that defendants have "engaged in the practice of opposing any and all applications for the establishment of competing banks" (Appx. 18). It also alleges that the defendants, relying in all instances upon sham and spurious grounds, repeatedly initiated additional and further proceedings and litigation by: (1) appealing to the Banking Board following their unsuccessful opposition before the Commissioner of Finance, (2) voluntarily intervening in the action instituted by petitioner in the Circuit Court for review of the Banking Board's order, (3) filing a motion for rehearing by the Court of Appeals, (4) filing a second motion for a second rehearing by the Court of Appeals, and (5) filing an application in the Supreme Court for transfer and review of the decision of the Court of

Appeals (Appx. 19, 20). In addition, to admit that one has engaged in a practice opposing any and all charter applications, necessarily implies that more than one application has been opposed, and where, as in this case, litigation is the only possible means by which such applications can be opposed, that admission is sufficient to establish the fact that defendants have resorted to repetitive litigation for the purpose of suppressing competition.

Neither *California Motor Transport* nor *Otter Tail* suggests a requirement that all such repetitive claims be made against the same party, as is at least implied by the opinion below (Appx. 12). Clearly, such a pattern of claims can be shown by showing claims of the same type against others. First bites are not permitted by the antitrust laws. There is, therefore, no basis whatever for the lower court's conclusion that *Otter Tail* does not apply because the present case involves "only *one* lawsuit" and *Otter Tail* involved "a pattern of baseless, repetitive claims" (Appx. 12). Under the *Otter Tail* decision, if defendants' agreement, conspiracy and scheme to act in concert to attempt to monopolize by restraining and preventing the establishment of competing banks is illegal under the Sherman Act, then recovery can be had for injury caused by their efforts to carry out that agreement, conspiracy and scheme, even though such efforts involved nothing more than the employment of legal means. It is the long and well established law that antitrust liability exists though legal means are used to carry out an agreement or conspiracy to suppress or prevent competition. In *American Tobacco Co. v. U. S.*, 328 U. S. 781, l.c. 809 (1946), this Court expressed the rule as follows:

> "It is the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the law forbids, they come within its prohibitions."

In *Continental Ore Company v. Union Carbide Corp.*, 370 U. S. 690, 788 (1962), this Court reaffirmed the above stated rule by saying that "it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme", citing, among other authorities, *Slick Airways, Inc. v. American Airlines, Inc.* (1952), 107 F. Supp. 199, which involved no activity other than litigation. *California Motor Transport* also reaffirmed this rule by stating that "if the end result is unlawful, it matters not that the means used in violation may be lawful" (404 U. S. 515).

The opinion below recites that "defendants' intervention and appeals" were "authorized by the state legislature", thus by implication at least, holding that conduct authorized by a state is immune from antitrust liability. That holding is in direct conflict with this Court's recent decision in *Cantor v. Detroit Edison Co.* (decided by this court in July of 1976 and numbered "No. 75-122", reported in 49 L. Ed.(2) 1145), where the Court said: "the court has already decided that state *authorization, approval, encouragement,* or *participation* in restrictive private conduct confers no antitrust immunity" (pp. 1150-1151, 49 L.Ed. 2nd), citing *Schwegman Bros. v. Calvert Distiller Corp.*, 341 U. S. 341, 368 (1951); *Parker v. Brown*, 317 U. S. at 351 (1943), *Goldfarb v. Virginia Bar*, 421 U. S. 773 at 790, 791, and *Continental Ore Co. v. Union Carbide and Carbon Co.*, supra. The gist of these decisions is that where private parties exercise freedom of choice as to the action taken, they should be held responsible for the consequences of their decisions and acts. In the present case the state had absolutely nothing to do with defendants' decisions to enter into the conspiracy or with their decision to resort to sham, spurious and unsuccessful litigation for the purpose of carrying out their conspiracy. The opinion below is therefore in conflict with the above decisions.

In the extensively regulated business world of today, if, as the opinion below holds, antitrust liability cannot be predicated upon joint and concerted misuse or abuse of the adjudicative processes by existing businesses, for the sole purpose of carrying out a conspiracy and scheme to exclude potential competitors, then competition in such regulated industries will be virtually unprotected. The expense incident to protracted litigation could, and in many instances would, be an unbearable burden to many prospective competitors with limited means and they will be denied the opportunity to compete.

CONCLUSION

The opinion below is plainly in conflict with the controlling decisions of this court in the respects hereinabove pointed out, and with the above cited decisions of other Courts of Appeals. It involves an important public question relating to the nature and extent of First Amendment antitrust immunity as it applies to the employment of state adjudicative bodies for anticompetitive purposes, and this Court should review this case for the purpose of clearly declaring that the policies of the antitrust laws are not to be sacrificed merely because governmental adjudicative processes are employed to accomplish results declared by those laws to be illegal. The lower courts' numerous departures from the accepted and usual course of judicial procedure were such that they have effectively denied petitioner due process of law and this Court's exercise of its supervisory powers would appear to be justified.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

EXHIBIT A

United States Court of Appeals
For the Eighth Circuit

No. 76-1425

Central Bank of Clayton, Appellant, v. Clayton Bank, St. Louis County National Bank, First National Bank of Clayton, James R. James, Jr., Edward H. Schmidt and Al J. Ruch, Appellees.	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: January 12, 1977

Filed: January 14, 1977

Before Heaney and Stephenson, Circuit Judges, and Stuart,* District Judge.

ORDER

This appeal arises out of an action in which appellant, Central Bank of Clayton, sought to recover treble damages for al-

* The Honorable William C. Stuart, United States District Judge for the Southern District of Iowa, sitting by designation.

leged violations of the federal antitrust laws, 15 U.S.C. §§ 1 and 2. After an analysis of the pleadings in light of the Noerr-Pennington doctrine and the sham exception thereto, the district court dismissed appellant's complaint without prejudice for failure to state a claim upon which relief could be granted. The district court subsequently denied appellant's motion for reconsideration or alternatively for leave to file amended complaint. Upon careful consideration of the record, the briefs and the arguments of the parties, we affirm on the basis of the district court's well-reasoned opinion in *Central Bank of Clayton v. Clayton Bank, et al.*, — F. Supp. — (E.D. Mo. 1976).

A true copy.

Attest: Robert C. Tucker

Clerk, U. S. Court of Appeals, Eighth Circuit

February 25, 1977

EXHIBIT B

Central Bank of Clayton,
a Corporation,
Plaintiff,

v.

Clayton Bank, a Corp., et al.,
Defendants.

No. 75-706C(A)

United States District Court,
E. D. Missouri, E. D.

April 13, 1976

Applicant for state bank charter brought action against competing banks and their officers charging that defendants' intervention in state administrative and judicial proceedings was done pursuant to an agreement or conspiracy in violation of federal antitrust laws. Defendants moved to dismiss for failure to state a claim. The District Court, Harper, J., held that no cause of action was alleged insofar as complaint was predicated on mere attempt by defendants to lawfully induce state administrative and judicial action favorable to themselves and detrimental to plaintiff even if such action was undertaken for anticompetitive purposes, that whether the statutory grounds asserted by defendants as warranting denial of the charter were "sham or spurious" had no bearing on whether a federal antitrust claim existed within the "sham exception" to rule them Sherman Act does not prohibit two or more persons from associating together in attempt to persuade the government to take particular action

with respect to a particular matter although result may be to produce a restraint or monopoly.

Motion sustained and cause dismissed.

Lloyd E. Boas, St. Louis, Mo., for plaintiff.

Ziercher, Hocker, Tzinberg, Human & Michenfelder, Clayton, Mo., Mortimer A. Rosecan, St. Louis, Mo., Lashly, Caruthers, Thies, Rava & Hamel, Clayton, Mo., Bryan, Cave, McPheeters & McRoberts, St. Louis, Mo., for defendants.

Memorandum and Order

Harper, District Judge.

This matter is before the Court on the separate motions of defendants, Clayton Bank and James R. James, Jr., St. Louis County National Bank and Edward H. Schmidt, and First National Bank of Clayton and Al J. Ruch, to dismiss for failure to state a claim upon which relief can be granted, Rule 12(b)(6) F.R.C.P.

Plaintiff brings this action pursuant to 15 U.S.C. §§ 1, 2 and 15, seeking treble damages for an alleged violation of the Sherman and Clayton Antitrust Acts. The principal allegations in the complaint may be summarized as follows: Plaintiff corporation filed with the Missouri Commissioner of Finance an application for a charter for a bank in Clayton, Missouri. Defendant corporations and their chief executive officers, respectively, who would be competitors of the plaintiff in the banking business in Clayton, Missouri, if the bank charter were granted, intervened in state administrative proceedings and pursuant to Mo. Rev.Stat. §§ 361.094-.096, opposed the issuance of plaintiff's charter. When the charter was issued by the Commissioner

on February 28, 1972, the defendants appealed. The State Banking Board reversed and issued an order revoking the charter. The Board's order was sustained by the Circuit Court of St. Louis County. A subsequent appeal to the Missouri Court of Appeals, St. Louis District, reversed the Circuit Court, thereby reinstating plaintiff's charter.

Briefly stated, plaintiff alleges that defendants' intervention in those administrative and judicial proceedings was done pursuant to an "agreement and conspiracy * * * as a part of a scheme to restrain commerce and prevent competition" in their primary service area. It is further alleged that defendants' concerted opposition to the granting of plaintiff's charter was based solely on several "sham and spurious" grounds as part of a scheme to "restrain and prevent lawful competition in the banking business in the City of Clayton, and [that] such conduct constitutes a violation of sections 1 and 2 of Title 15 USCA." Plaintiff specifically alleges:

> "26. That throughout all of the proceedings hereinabove referred to the defendants based their opposition to the granting of the plaintiff's charter solely on the following sham and spurious grounds:
>
> "26(a). that their banks were and could meet the present and future banking needs of the community;
>
> "26(b). that under the Missouri facility law the existing banks could provide convenient banking services in other areas of the City;
>
> "26(c). that existing banking services were adequately serving the business and individual banking needs of the community;
>
> "26(d). that a new additional bank is not necessary or desirable for the City of Clayton;
>
> "26(e). that a new bank could have an adverse effect upon the future 'growth rate' of existing banks;

"26(f). that a new bank would draw some deposits from existing banks but that neither the solvency nor the profits of the existing banks would be impaired;

"26(g). that a new bank would be an additional competitive load;

"26(h). that a new bank would not add any new banking services which are not presently available to the public;

"26(i). that a new bank would add nothing to the driving convenience of the public;

"26(j). that there had been no public complaint about the inadequacy of existing banking services;

"26(k). that the grant of a charter to incorporators having an agreement to sell their shares to a Registered Bank Holding Company after the charter is granted and when and if such sale is approved by the Federal Reserve Board would constitute a violation of the Missouri law prohibiting branch banking.

"27. That the above mentioned grounds are sham and spurious for the reason that they have no relevancy to the issues to be determined in granting or refusing an application for a bank charter, and therefore such facts, even if true, would not justify the denial of a bank charter." * * *

Damages are alleged as a direct result of having been prevented from engaging in the banking business. Defendants deny, in effect, that their conduct in invoking these state governmental processes constitutes a violation of the Sherman and Clayton Acts.

This Court has jurisdiction over the subject matter. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975).

Two grounds are presented for the several motions to dismiss: First, that the specific conduct of defendants did not violate 15 U.S.C. §§ 1 and 2, and second, that, if a violation does exist, the specific conduct of defendants was not the proximate cause of plaintiff's damages. Since we dispose of this matter on the first ground, we do not consider the second.

In *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S.Ct. 1843, 1849, 23 L.Ed.2d 404 (1969), the Court said:

> "For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. (Omitting citation.) And, the complaint is to be liberally construed in favor of plaintiff. See Fed.Rule Civ.Proc. 8(f); *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; (1957). The complaint should not be dismissed unless it appears that appellant could 'prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, supra, at 45-46, 78 S.Ct. [99] at 102."

See also: *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974); *Barnes v. Dorsey*, 480 F.2d 1057, 1060 (8th Cir. 1973). In *Bramlet v. Wilson*, supra, at 716, the Court said:

> "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes alegations that show on the face of the complaint that there is some insuperable bar to relief."

The case before the Court is such a case for dismissal because plaintiff miconstrues the nature of the cause of action authorized by the "sham exception" to the Noerr-Pennington doctrine.

[1] No cause of action is alleged here insofar as the complaint is predicated upon mere attempts by defendants to lawfully induce state administrative and judicial action favorable

to themselves and detrimental to plaintiff. This effort to induce favorable governmental action, even for an anti-competitive purpose, is not a violation of the antitrust laws. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the plaintiffs alleged a pervasive and vicious publicity campaign designed and motivated solely to destroy the competing trucking business by influencing legislative and executive governmental treatment favorable to the railroads. The Court rejected the contention that the vicious nature and anticompetitive motivation behind the deceptive campaign rendered the conduct actionable: "[T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." Id. at 136, 81 S.Ct. at 529. The Court did, however, provide an exception, commonly known as the "sham exception", to this rule, where conduct "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." Id. at 144, 81 S.Ct. at 533. See *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed. 2d 626 (1965). In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), this antitrust immunity was extended to administrative agencies and courts. The Court there said:

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state * * * agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." Id. at 510-11, 92 S.Ct. at 612.

California Motor Transport also extended the "sham" exception and held that the plaintiffs had alleged a case that fell within it. The conduct alleged was found not to be a genuine effort to influence public officials. Here, however, plaintiffs have not alleged that defendants' conduct was "a mere sham to cover what is actually nothing more than an attempt to interfere *directly* with the business relationships of a competitor." (Emphasis added.) *Noerr, supra*, 365 U.S. at 144, 81 S.Ct. at 533. Rather, plaintiff alleges that defendants urged "sham and spurious" grounds for denial of plaintiff's bank charter, an oblique suggestion, perhaps, without specifically so stating, that defendants' conduct is therefore within the "sham exception" to *Noerr*, as typified in *California Motor Transport*. Reading the complaint in the light most favorable to plaintiff and taking all well-pleaded factual averments as true, *Conley v. Gibson*, supra, plaintiff has failed to aver material facts sufficient to bring defendants' conduct within a cause of action.

Missouri statutes provide for review by the State Banking Board of the grant or denial of a bank charter by the Commissioner of Finance. Mo.Rev.Stat. 361.094(2) directs:

> "The state banking board shall hear and by order determine an appeal from the action of the commissioner granting the incorporation * * * of a bank or trust company upon application filed * * * by a bank, trust company, national banking association or other persons claiming to be adversely affected thereby. The application shall state the grounds upon which it is alleged that the action of the commissioner should be stayed, reversed or altered * * *."

Similarly, id. 361.095(3) allows intervention by:

> "* * * any person claiming to be adversely affected and any bank, trust company or national banking association located in the city or town and county in which the pro-

posed bank or trust company is to be located upon incorporation or relocation * * *."

Thus, defendants' intervention and subsequent appeals in the state agencies and courts were authorized by the state legislature. The grounds for refusing or granting plaintiff's bank charter, including those urged by defendants for its refusal quoted in paragraph 24 of the complaint, were properly considered by those agencies and courts for their probative value. *Central Bank of Clayton v. State Banking Board of Missouri*, 509 S.W.2d 175 (Mo.App. 1975). Whether or not those grounds were "sham or spurious" has no bearing on whether or not a federal antitrust claim exists within the "sham exception" to the *Noerr-Pennington* doctrine, i. e., where conduct "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere *directly* with the business relationships of a competitor * * *." *Noerr*, supra, 365 U.S. at 144, 81 S.Ct. at 533 (emphasis added).

The Court in *California Motor Transport*, supra, noted that unethical conduct that may be tolerated in a political context may result in violations in the setting of the adjudicatory process. The opinion cites as examples of such conduct: Perjury, use of a patent obtained by fraud to exclude a competitor from the market, *Walker Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 175-77, 86 S.Ct. 347, 15 L.Ed. 2d 247 (1965), conspiracy with a licensing authority to eliminate a competitor, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), *Harman v. Valley Nat'l Bank*, 339 F.2d 564 (9th Cir. 1965), bribery of a public purchasing agent, *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965), and misrepresentations. 404 U.S. at 512-13. Plaintiff does not allege facts that would suggest any comparable unethical conduct.

As to the alleged "sham and spurious" nature of the grounds used by defendants to oppose plaintiff's application, we refer again to the words of the Supreme Court in *California Motor Transport*, supra, at 512-13, 92 S.Ct. at 613:

> "Opponents before agencies or courts often think poorly of each other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact-finder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts * * *."

Plaintiff has not alleged a "pattern of baseless, repetitive claims," such as that in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), where "[i]t was found that Otter Tail instituted or sponsored litigation involving four towns in its service area which had the effect of halting or delaying efforts to establish municipal [power] systems * * *. 'The delay thus occasioned and the large financial burden imposed on the towns' limited treasury dampened local enthusiasm for public ownership.' * * *." Id. at 372, 93 S.Ct. at 1027. Cf. *Morgan Drive Away*, et al. (Proposed Consent Judgment and Competitive Impact Statement), 41 Fed.Reg. 3758 (D.D.C.1976), where the complaint alleged that defendants, who were engaged in the for-hire transportation of mobile homes, had conspired, *inter alia*, to exclude other persons from the industry since the early 1950's by carrying out "*a series of acts which, as a whole, served to deprive 'persons applying for mobile home authority of meaningful access to and of fair hearings before, federal and state agencies and courts.'*" (Emphasis added.) Id. at 3762.

[2] In the instant case, there was only one lawsuit. Plaintiff was *not* effectively barred from access to the agencies and courts under the sham test set out in *California Motor Transport. Accord, Bethlehem Plaza v. Campbell,* 403 F.Supp. 966, 970 (D. Pa.1975). Furthermore, construing the pleadings liberally, it does not appear that defendants' intervention and subsequent appeals in the state agencies and courts were baseless, since defendants prevailed at two stages of the appeals that followed denial of the charter. While recognizing that the findings of the state courts and agencies are not binding on this Court for the purpose of determining whether or not a federal antitrust case has been successfully pleaded, we think that some weight can be given to this averment as it goes to the existence *vel non* of one of the elements that comprise the "sham exception" to *Noerr-Pennington,* as stated in *California Motor Transport.*

Accordingly, the separate motions of defendants, Clayton Bank and James R. James, Jr., St. Louis County National Bank and Edward H. Schmidt, and First National Bank of Clayton and Al J. Ruch, to dismiss the complaint are sustained, and the cause is dismissed without prejudice for failure to state a claim upon which relief can be granted.

EXHIBIT C

United States Court of Appeals for the Eighth Circuit

76-1425 September Term, 1976

Central Bank of Clayton, etc., Appellant, vs. Clayton Bank, etc., et al., Appellees.	Appeal from the United States District Court for the Eastern District of Missouri

For cause shown it is now here ordered that appellant may have to and including February 7, 1977, in which to file petition for rehearing.

January 21, 1977

EXHIBIT D

United States Court of Appeals for the Eighth Circuit

76-1425 September Term, 1976

Central Bank of Clayton, etc., Appellant,
vs.
Clayton Bank, etc., et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 16, 1977

EXHIBIT E

United States Court of Appeals for the Eighth Circuit

76-1425 September Term, 1976

Central Bank of Clayton, etc., Appellant,
vs.
Clayton Bank, etc., et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

February 17, 1977

EXHIBIT F

In the United States District Court
Eastern District of Missouri
Eastern Division

Central Bank of Clayton,
Plaintiff,
vs.
Clayton Bank, et al.,
Defendants.
No. 75-706C (A).

COMPLAINT

(Filed in U. S. District Court August 12, 1975)

Comes now the Plaintiff and for its complaint against the defendants states as follows:

1. This is an action for the recovery of damages under the Federal antitrust laws and this court has jurisdiction under and by virtue of Sections 1, 2, and 15, Title 15 U.S.C.A.

2. Plaintiff is a corporation, organized and existing under the laws of the State of Missouri and engaged in the banking business with its principal place of business in the City of Clayton, County of St. Louis, State of Missouri.

3. Defendant, Clayton Bank, is a corporation engaged in the banking business with its principal place of business in the City of Clayton, County of St. Louis, State of Missouri.

4. Defendant, St. Louis County National Bank, is a corporation engaged in the banking business with its principal place

of business in the City of Clayton, County of St. Louis, State of Missouri.

5. Defendant, First National Bank of Clayton, is a corporation engaged in the banking business with its principal place of business in the City of Clayton, County of St. Louis, State of Missouri.

6. That at all times hereinafter mentioned defendant James R. James, Jr., was an officer and director of defendant Clayton Bank and the activities of said bank, as hereinafter alleged, were under his direct supervision and control.

7. That at all times hereinafter mentioned defendant Edward H. Schmidt was an officer and director of defendant St. Louis County National Bank and the activities of said bank, as hereinafter alleged, were under his direct supervision and control.

8. That at all times hereinafter mentioned defendant Al J. Ruch was an officer and director of defendant First National Bank of Clayton and the activities of said bank, as hereinafter alleged, were under his direct supervision and control.

9. That all of the corporate defendants were at all times herein mentioned engaged in business affecting interstate commerce in the among other things, they:

9(a). made and participated in loans to individuals, partnerships or corporations located in states other than Missouri;

9(b). accepted deposits by individuals, partnerships or corporations located in states other than Missouri;

9(c). bought, sold, and otherwise dealt in securities issued by Governmental entities and instrumentalities of states other than Missouri;

9(d). bought, sold and otherwise dealt in securities issued by corporations of states other than Missouri;

9(e). bought and sold Federal funds from and to other banks or financial institutions located in states other than Missouri.

10. That plaintiff is engaged in business affecting interstate commerce in that it engages in the activities mentioned in subparagraphs 9(a), 9(b), 9(c), 9(d), and 9(e) above.

11. That at sometime prior to October 1971 the defendants agreed and conspired among themselves to engage in concerted actions in attempting to monopolize the banking business in the City of Clayton by restraining and preventing the establishment or relocation of competing bank or banks in said city.

12. That pursuant to and in furtherance of said agreement and conspiracy, and as a part of a scheme to restrain commerce and prevent competition in the City of Clayton and the surrounding area which they consider to be their primary service area, defendants, acting in concert, have engaged in the practice of opposing any and all applications for the establishment or relocation of competing banks in said area.

13. That on October 1, 1971, the application for the establishment of plaintiff, Central Bank of Clayton, was filed with the Division of Finance of the State of Missouri.

14. That pursuant to and in furtherance of said agreement and conspiracy and as a part of their scheme to restrain and prevent competition, the defendants, acting in concert and all represented by one counsel, opposed the application for the establishment of said Central Bank of Clayton before the Commissioner of Finance.

15. That on February 28, 1972, the Commissioner of Finance, after the investigation required by the applicable statutes of the State of Missouri, issued an order granting a charter to plaintiff, Central Bank of Clayton.

16. That pursuant to and in furtherance of the aforesaid agreement and conspiracy, and as a part of their scheme to restrain and prevent competition, defendants, acting in concert and all represented by one counsel, appealed the decision of the Commissioner of Finance to the State Banking Board of Missouri on the sham and spurious ground that they were adversely affected thereby.

17. That on May 1, 1972, the State Banking Board of Missouri, after hearing in which defendants acted in concert and were represented by the same counsel, issued an order reversing the Commissioner of Finance and purportedly revoking the charter of the plaintiff, Central Bank of Clayton.

18. That a petition for review of the Banking Board's order was filed by plaintiff, Central Bank of Clayton, in the Circuit Court of the County of St. Louis.

19. That pursuant to and in furtherance of said agreement and conspiracy, and as a part of their scheme to restrain and prevent competition, the corporate defendants, though not adversely affected by the Commissioner's order granting plaintiff's charter, intervened in said Circuit Court proceedings, sought to have the Banking Board's order affirmed, and opposed the plaintiff's contention that the order of the Banking Board should be reversed and the charter reinstated.

20. That as a result of defendant's intervention and opposition, the Circuit Court was induced to erroneously affirm that part of the Banking Board's order which held that because there was no evidence adduced by any public witness to indicate or show public need for the proposed bank; no evidence of any complaint or inadequacy with presently existing banking services, and that no more than a "token need" for the proposed bank was shown by the evidence, the record did not support the Commissioner's finding and conclusion that the convenience and needs of the community justified and warranted the issuance of plaintiff's charter.

21. That the Banking Board did not appear, by counsel or otherwise, in the Circuit Court proceedings and the Attorney General of the State of Missouri refused to represent said Banking Board for the reason that the Banking Board's order was in conflict with an opinion issued to the Banking Board in July of 1971.

22. That the Commissioner of Finance of the State of Missouri was a party to the Circuit Court proceedings, supported the plaintiff's contention, and joined plaintiff in the appeal from the judgment of the Circuit Court.

23. That on appeal the St. Louis Court of Appeals, in both an original opinion and in a unanimous seven judge opinion rendered after Motion for Rehearing filed by the corporate defendants herein, reversed the Circuit Court judgment and reinstated plaintiff's charter and held that the order of the Banking Board "inhibits lawful competition in the Clayton banking market."

24. That the corporate defendants, acting pursuant to and in furtherance of the aforesaid agreement and conspiracy and as a part of their scheme to restrain and prevent competition, filed another motion for another rehearing by the Court of Appeals which was coupled with a Motion for Transfer to the Missouri Supreme Court, and that Motion was overruled by the Court of Appeals.

25. That thereafter the corporate defendants filed in the Supreme Court of Missouri an application for a transfer of the cause to that court for review, and the Supreme Court denied that application on May 10, 1974.

26. That throughout all of the proceedings hereinabove referred to the defendants based their opposition to the granting of the plaintiff's charter solely upon the following sham and spurious grounds:

26(a). that their banks were and could meet the present and future banking needs of the community;

26(b). that under the Missouri facility law the existing banks could provide convenient banking services in other areas of the City;

26(c). that existing banking services were adequately serving the business and individual banking needs of the community;

26(d). that a new additional bank is not necessary or desirable for the City of Clayton;

26(e). that a new bank could have an adverse effect upon the future "growth rate" of existing banks;

26(f). that a new bank would draw some deposits from existing banks but that neither the solvency nor the profits of the existing banks would be impaired;

26(g). that a new bank would be an additional competitive load;

26(h). that a new bank would not add any new banking services which are not presently available to the public;

26(i) that a new bank would add nothing to the driving convenience of the public;

26(j). that there had been no public complaint about the inadequacy of existing banking services;

26(k). that the grant of a charter to incorporators having an agreement to sell their shares to a Registered Bank Holding Company after the charter is granted and when and if such sale is approved by the Federal Reserve Board would constitute a violation of the Missouri law prohibiting branch banking.

27. That the above mentioned grounds are sham and spurious for the reason that they have no relevancy to the issues to be determined in granting or refusing an application for a

bank charter, and therefore such facts, even if true, would not justify the denial of a bank charter.

28. That by engaging in the activities hereinabove mentioned defendants have utilized Governmental processes solely for the purpose of accomplishing the purposes of their aforesaid agreement and conspiracy and to further their scheme to restrain and prevent lawful competition in the banking business in the City of Clayton, and such conduct constitutes a violation of sections 1 and 2 of Title 15 U.S.C.A.

29. That by reason of and as a direct result of defendants' violations of the above mentioned laws, plaintiff was prevented from engaging in the banking business in the City of Clayton for the period from February 28, 1972 to August 12, 1974.

30. That as a direct result of being prevented from engaging in business for the aforesaid period, plaintiff suffered and sustained losses and damages in the form of increased construction, equipment, fixture, and supply costs; rent payments; attorney's fees and expenses; printing costs; and loss of anticipated profits, all totalling approximately Four Hundred Fifty Thousand Dollars ($450,000).

31. That under the terms and provisions of Section 15 of Title 15, U.S.C.A., Plaintiff is entitled to recover from defendants threefold damages, plus costs and a reasonable attorney's fees.

Wherefore, Plaintiff prays judgment against the defendants for the sum of One Million Three Hundred Fifty Thousand Dollars ($1,350,000), plus costs and reasonable attorneys' fees in an amount to be determined by the court.

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Attorney for Plaintiff

EXHIBIT G

In the United States District Court
Eastern District of Missouri
Eastern Division

Central Bank of Clayton, Plaintiff,
vs.
Clayton Bank, et al., Defendants.
No. 75-706C(A)

PLAINTIFF'S MOTION

For Reconsideration, Vacation of the Order of Dismissal With Prejudice, or, Alternatively Amendment of Said Order So as to Grant Plaintiff Leave to File an Amended Complaint, or Converting the Motions to Dismiss Into Motions for Summary Judgment

(Filed in U.S. District Court April 23, 1976)

Comes now the plaintiff and respectfully moves the Court to reconsider the order of dismissal with prejudice and to vacate the same, or, in the alternative, (1) to amend said order so as to grant plaintiff leave to amend the complaint, or (2) treating the defendants' motions to dismiss into motions for summary judgment under Rules 12(b) and 56, and as grounds therefor plaintiff states as follows:

(1) In holding that the complaint is based upon "mere attempts by defendants to lawfully induce" state action, and that it fails to state that defendants' conduct was mere sham to cover

what was actually nothing more than attempt to interfere with plaintiff's business relationships (Memo and Order, p. 5); that there was only one lawsuit, and that the complaint only contains an "oblique suggestion" of that fact; and fails to allege a "pattern of baseless repetitious claims," the Court has failed to construe the complaint in the light most favorable to the plaintiff and to draw all favorable inferences in favor of plaintiff.

(2) The Memorandum and Order of the Court indicates that matters other than the allegations of the complaint were presented and not excluded by the Court and under such circumstances, the order of dismissal with prejudice without notice affording plaintiff an opportunity to present the material made pertinent by Rule 56, is contrary to law and constitutes an abuse of discretion.

(3) In holding that the question of whether or not the grounds urged by defendants in the litigation involving plaintiff's charter application were " 'sham or spurious' has no bearing on whether or not a federal antitrust claim exists within the 'sham exception' to the Noerr-Pennington doctrine" (Memo & Order, pp. 6-7), the Court has misconstrued, misinterpreted or failed to consider the law as stated in the following cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127; *United Mine Workers v. Pennington*, 381 U.S. 657; *California Motor Transport Co. v. Trucking Unlimited*, 381 U.S. 657; *Trucking Unlimited v. California Motor Transport Co., et al.*, 432 F.(2d) 755; *Otter Tail Power Co. v. U. S.*, 410 U.S. 366; *Woods Exploration and Prod. Co. v. Aluminum Co. of Amer.*, 438 F.(2d) 1286; *Israel v. Baxter Laboratories, Inc.*, 466 F.(2d) 272; *Hecht v. Paddock Pool Builders, Inc.*, 424 F.(2d) 25; *Parker v. Brown*, 317 U.S. 341; *Bethlehem Plaza v. Campbell*, 403 F.Supp. 966; *American Federation Tobacco Growers v. Neal*, 183 F.(2d) 869; *Market Assist. Plan, Inc. v. Assoc. Milk Prod., Inc.*, 338 F.Supp. 1019; and *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.(2d) 416.

(4) Under the most favorable construction of the complaint and under the authorities mentioned above, there can be no insurmountable bar to relief for plaintiff; on the basis of the complaint and the depositions heretofore filed with this Court, it is apparent that plaintiff can allege with more particularity the elements held by the Court to be essential to the statement of a cause of action for violation of the antitrust laws and dismissal without prejudice, without leave to amend is unjustifiably harsh and constitutes an abuse of discretion.

Wherefore, plaintiff prays the Court to vacate the order of dismissal and grant reconsideration of the dismissal motions as motions for summary judgment so that plaintiff will be afforded the right to present all matter pertinent under Rule 56, or in the alternative, to modify said order so as to grant the plaintiff leave to amend its complaint so as to more particularly state the elements mentioned by the Court.

Respectfully submitted,

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EXHIBIT H

In the United States District Court
Eastern District of Missouri
Eastern Division

Central Bank of Clayton,
Plaintiff,
vs.
Clayton Bank, et al.,
Defendants.
No. 75-706C (A).

ORDER

(Filed in U. S. District Court May 10, 1976)

This matter is before the Court on plaintiff's motion for reconsideration, vacation of the order of the dismissal with prejudice, or alternatively amendment of said order so as to grant plaintiff leave to file amended complaint, or converting the motions to dismiss into motions for summary judgment.

That part of the motion seeking vacation of the order of dismissal with prejudice was inadvertently inserted, in that the order of dismissal previously entered by the Court in this case was without prejudice. The attorney for the plaintiff orally requested that that part of the motion be not considered since it was moot.

After consideration of the plaintiff's brief, and the brief of the defendants, Clayton Bank and James, which brief was adopted by the other defendants, the plaintiff's motion is overruled in all particulars, except with respect to the vacation of the order of dismissal with prejudice, which is moot.

ROY W. HARPER
U. S. District Judge

EXHIBIT I

Central Bank of Clayton,
Plaintiff-Appellant,
and
Duane Pemberton, Commissioner of Division
of Finance, State of Missouri,
Defendant-Appellant,
v.
State Banking Board of Missouri
et al., Defendants-Respondents,
and
Clayton Bank et al., Intervenors-Respondents.

No. 34959.

Missouri Court of Appeals,
St. Louis District,
Division 2.

March 12, 1974.

Motion for Rehearing or Transfer Denied

April 8, 1974.

Application to Transfer Denied

June 10, 1974.

Proceeding in review of Banking Board order revoking charter of proposed bank. The Circuit Court, St. Louis County, Ninian M. Edwards, J., affirmed in part and reversed in part, and ap-

peals were taken. The Court of Appeals, McMillian, J., held that with regard to depository functions, purpose of "convenience and needs of the community" amendment to bank chartering act is to protect public against excessive competition in local banking business against imprudent business practices and purpose of such amendment with regard to lending and other credit functions, is to favor bank entry, which will stimulate competition consonant with prudent banking practices and bank safety, and to discourage monopoly in lending field, that findings by Board that deposits in existing banks were growing faster than the determinants of need for banking facilities, that new bank would probably not be successful and that entry of a new bank could threaten ability of largest existing bank in area to compete among banks of its size in entire metropolitan area were not supported by substantial evidence, that Board lacked jurisdiction to decide whether the organization of proposed bank, with an accompanying agreement by incorporators to transfer control of such bank to multibank holding company, violated state restrictions against branch banking.

Judgment affirmed in part and reversed in part with directions.

Smith, and Weier, JJ., not participating.

McMillian, Judge.

This litigation grows out of an attempt to establish a new bank in downtown Clayton, Missouri, the commercial and governmental hub of St. Louis County and an area now served by several banking institutions. Plaintiff-Appellant, the Central Bank of Clayton (Central Bank), which has proposed the new bank, and Defendant-Appellant, the Commissioner of the Division of Finance of the State of Missouri (the Commissioner), appeal from an order of the Circuit Court of St. Louis County, affirming in part and reversing in part an order of Defendant-Respondent, the State Banking Board of Missouri (the Board). Also

parties to the appeal are Intervenors-Respondents, the Clayton Bank, St. Louis County National Bank, and the First National Bank of Clayton, existing banks in downtown Clayton, and the Missouri Independent Bankers Association. The last-named party is interested solely in the question whether a multi-bank holding company violates Missouri statutes prohibiting branch banking.[1]

* * * * * * * *

In opposing the new bank, Respondents, the three existing banks in Clayton, presented a report and testimony by an expert witness. To measure "convenience," respondents' expert employed what is called "isochronal analysis" of the Clayton area. This analysis is based on measurement of automobile driving time/distances to determine what area will be served by the new bank; the analysis is grounded in an assumption that the volume of business a new bank attracts will vary proportionately with the amount of driving time customers must expend to reach the new bank. The expert found, not surprisingly, that the "isochron," or area within five minutes driving time, of the new bank was overlapped by isochrons of at least three, and in some places four, other existing banks. The expert concluded that the Clayton area was saturated with adequate banking services offered by the existing banks, and that the new bank would add little or nothing to public convenience since seventy-five percent of the people in the area could reach four or five other banks within four or five minutes driving time.

To determine the "need" for a new bank, respondents' expert studied various economic and demographic statistics. He determined that the Clayton area was a predominantly residential neighborhood whose population and household growth rates had matured, that the residents of the area were largely upper-income families whose average age was increasing, and that the area lacked a major shopping center. The expert admitted that he did not consider the amount of growth in office space in the

Clayton area and that he probably underestimated the size of the daytime work force in downtown Clayton. (The expert did estimate that about fifty percent of the persons who worked in Clayton also banked there, regardless of their household residence.) Assuming that the need for a new bank depended upon the growth of the number of households in the surrounding area compared with the growth of existing banks, the expert concluded that the existing banks were growing faster than the determinants of need for banking services, i. e., the number of residential households. The expert concluded further that: (1) the new bank would have to attract deposits from areas served by existing banks; (2) the new bank represented a definite threat to the growth rate of the existing banks; (3) establishment of the new bank would *not* impair the profits of the existing banks but would result in increased promotional activity with no gain to the public; and (4) the new bank could threaten the ability of the largest Clayton bank, St. Louis County National (Respondent), to compete among the larger banks in the St. Louis metropolitan area if the new bank was able to compete effectively for deposits in the Clayton area.

Respondents' expert estimated that the new bank would accumulate $3.8 million in deposits in its first year of operation, $5.8 million in the second, and $6.7 million in the third. In his report, the expert estimated the new bank would achieve profitable operations within two or three years, but in testimony before the Board he changed his mind and said that he did not think the new bank would prosper. He did not cite statistics to support this changed estimate.

* * * * * * *

[7] We turn now to the question whether the evidence and findings in the instant case are probative to "the convenience and needs of the community," as we have construed its meaning. Considering first the Board's express findings, we have

already concluded that "need" is not used in this statutory provision in an absolute sense, as the Board uses it, but is related to the history and objectives of the statute. There is no requirement in the statute that public witnesses produce evidence showing need for a new bank or complaint with existing banks.[11] These considerations are not within the ambit of the bank chartering act as we have construed it, and the Board erred in interpreting the statute to require such evidence.

[8] Secondly, we must consider evidence produced at the hearing which supports the Board's position. Again we find serious misinterpretations of the meanings of community need and convenience. Thus, as we have defined these statutory terms, it is simply not relevant to the purposes of the statute, explained above, that in this case the proposed bank would add little or nothing to the driving convenience of people in Clayton. Nor is it relevant that the new bank might, in competing for deposits, affect the growth rate of existing banks or draw deposits from an area already served by several existing banks. Nor is it relevant that banks in the area might choose to increase their promotional efforts because of entry of the new bank. This is in the very nature of healthy competition. In sum, we hold that none of this evidence is, in the context of this case, relevant to a finding that the convenience and needs of the community would not justify the opening of the new bank.

* * * * * * *

The judicial task in this case is made somewhat easier because we have already found erroneous, within the statutory meaning of community convenience and needs, the Board's conclusions of law concerning the lack of any "public witness" or complaint with existing banking facilities. We have also found irrelevant, within the meaning of the statute, some of the evidence produced by respondents which supports the Board's order, particularly that evidence which shows that entry of a new bank will impair

the growth rate of existing banks, or will not add driving time convenience to the Clayton banking market, or will result in increased promotional costs for existing banks.

There remains, however, evidence presented by respondents' expert which does fall within the statutory meaning of community convenience and needs and which could support the Board's finding recited in Paragraph No. 1 of its order. We are concerned particularly with the expert's conclusions that: (1) deposits in existing banks are growing faster than the determinants of need for banking facilities; (2) the new bank will probably not be successful; and (3) entry of a new bank could threaten the ability of the largest existing Clayton bank to compete among banks of its size in the entire metropolitan area.

[10, 11] To arrive at his first conclusion, respondents' expert measured various demographic statistics and found that the population and household growth rate in the Clayton area was quite low. He also found that retail sales in that area were off considerably. Pointing then to the 13.6 percent average annual growth rate of deposits in existing banks, he concluded that the growth rate of banks was outstripping the growth rate of needs for banking facilities. Of itself, this evidence might provide support for an administrative finding against entry of a new bank. However, the constitutional requirement that we consider the evidence "upon the whole record" means that we must take into account whatever in the record fairly detracts from the substantiality of the evidence. Universal Camera Corp. v. National Labor Relations Board, supra. The record in this case discloses serious faults in the reasoning employed by respondents' expert. First, by his own admission, the expert failed to consider in his analysis the rather dramatic growth of the Clayton area as an office and commercial services community. To measure commercial activity, he analyzed statistics dealing with retail sales and industrial employment only. And second,

also by his own admission, the expert used daytime employment figures for Clayton (8,600) which were substantially lower than those furnished by approved commercial reporting agencies (35-40,000). The expert's employment figures were based solely on a poll answered by only a minority of those sampled.

The expert's conclusion, then, is an opinion based on an apparent discrepancy between two sets of statistical facts, the growth rate of bank deposits and the growth rate of households, population and retail sales; but, the omission of other facts cloud the discrepancy. In sum, we cannot find that this opinion is competent and substantial evidence upon which to rest the Board's finding in Paragraph No. 1 of its order, relating to community convenience and needs.

The expert's second conclusion, that the new bank would probably not be successful, was given in testimony and contradicts the same expert's earlier opinion given in his report. It is also contradicted by other expert testimony, and is unsupported by any facts. It cannot be substantial evidence within the meaning of the constitution and statute.

Respondents expert's last theory—that entry of a new bank could threaten the largest Clayton bank's competitive position in the metropolitan area—is ingenious. In effect, he is asking the Board to restrict competition on one level (Clayton) to improve competition on another (the St. Louis Metropolitan Area). Whatever, the merits of this robbing Peter to pay Paul theory within the meaning of community convenience and needs, we need not pass on it, for this theory is unsubstantiated by any facts concerning banking competition on the metropolitan level. Furthermore, it is noteworthy that the largest Clayton bank now controls over 32 percent of all deposits in the Clayton area, compared with only 12 percent for its nearest competitor. This bank is hardly in need of the additional competitive edge supplied by the restrictive new bank entry.

We hold, therefore, that a review of the whole record in this case shows that there is not competent and substantial evidence to support a Board finding which inhibits lawful competition in the Clayton banking market.

In conclusion, we find that the trial court erred in sustaining Finding Number One of the State Banking Board since that Order was not supported by competent and substantial evidence on the whole record. We further find that the trial court reached the right result in reversing the Board as to its Finding Number Two, but for a wrong reason. Accordingly, we affirm in part and reverse in part the judgment of the trial court with directions. The trial court is directed to set aside and hold for naught its affirmance of the Board's Finding Number One; and to enter a new judgment in accordance with the views expressed herein. The trial court is further directed to dismiss the Board's Finding Number Two for the reason that the Board lacked jurisdiction to decide the case on that issue. Finally, the charter granted to the Central Bank of Clayton by the Commissioner of the Division of Finance is hereby reinstated.